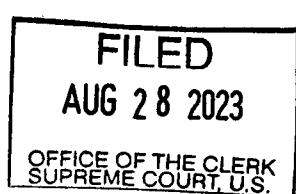


ORIGINAL

23-5738

No. _____

In the Supreme Court of the United States



ANGELA CAO

Petitioner,

v.

BSI FINANCIAL SERVICES, INCORPORATED;
CHRISTIANA TRUST, WILMINGTON SAVINGS
FUND SOCIETY, STANWICH MORTGAGE LOAN
TRUST SERIES 2012-10, STANWICH MORTGAGE
ACQUISITION COMPANY INCORPORATED,
CARRINGTON MORTGAGE SERVICES L.C.,
SELENE FINANCE L.P.; MTGLQ INVESTORS L.P.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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i. **QUESTIONS PRESENTED**

1. Whether factors of correct administration of the rules and fair procedure to allow a party an opportunity to litigate the question of jurisdiction must be considered prior to attaching res judicata to a jurisdictionally defective judgment.
2. Whether a court's omission which led a litigant to believe that it did not adjudicate matters beyond its authority constitutes as a deliberate usurpation of power or manifest abuse of authority.
3. Whether the courts are required to first find that it had subject-matter jurisdiction prior to denying and/or dismissing a Rule 60(b)(4) motion.

ii. **PARTIES TO THE PROCEEDING**

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Respondents:

Selene Finance L.P. ("Selene") and MTGLQ Investors, L.P. ("MTGLQ")
("MTGLQ&S", "Respondents" or "Defendants")

Counsel:

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Respondents:

BSI Financial Services, Inc. ("BSI"), Christiana Trust, a Division of Wilmington Savings Fund, Society, FSB, as Trustee ("Christiana") and Carrington Mortgage Services, L.L.C. ("CMS")
("BC&C", "Respondents" or "Defendants")

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iii. RELATED PROCEEDINGS

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Angela Cao v. BSI Financial Services et al.,
CV H-17-321, 2020 WL 5568656
(September 17, 2020) (Memorandum Opinion and Order for Final Judgment)

Angela Cao v. BSI Financial Services et al.,
CV H-17-321 2021 WL 76327 (January 8, 2021) (order denying
reconsideration)

United States Court of Appeals (5th Cir.):

Angela Cao v. BSI Financial Services et al. 858 Fed. Appx. 156. WL 4126971
(September 9, 2021) (order)

United States District Court (S.D. Tex.):

Angela Cao v. BSI Financial Services et al.,
CV H-17-321 2021 (October 26, 2022) (order denying Motion for Relief from
Judgment)

Angela Cao v. BSI Financial Services et al.,
CV H-17-321 2021 (December 13, 2022) (order denying reconsideration and
request for findings)

United States Court of Appeals (5th Cir.):

Angela Cao v. BSI Financial Services et al.
No. 22-20656 (March 23, 2023) (order dismissing MTGLQ & Selene)

Angela Cao v. BSI Financial Services et al.
No.22-20656 (March 31, 2023) (order dismissing BSI, CMS & Christiana)

Angela Cao v. BSI Financial Services et al.
No.22-20656 (May 30, 2023) (order denying rehearing en banc)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Angela Cao respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit and accordingly, the judgment in the United States District Court for the Southern District of Texas.

OPINIONS BELOW

The order dismissing Petitioner's appeal from of the court of appeals is unreported and attached infra as App. 1-4. The decision of the United States District Court for the Southern District of Texas denying Petitioner's Motion for Relief from Judgment and denial for reconsideration are unreported and attached infra as App. 5- 8.

JURISDICTION

The Fifth Circuit entered order dismissing the appeal in full on April 18, 2023. A timely petition for rehearing en banc was denied on May 31, 2023 (App.89- 91, infra). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are Article 3 § 1 et. seq. and the Fifth and Fourteenth Amendments to the United States Constitution. The pertinent statute involved is 28 U.S.C.

STATEMENT OF FACTS & PROCEEDINGS

This appeal involves a mortgage foreclosure case concerning Cao's home. In May 2019, the district court entered judgment against Respondents' failure of consideration and first-breach defenses upon the merits (herein "2019 judgment") (App.80-108). This judgment was uncontested by the parties. On September 17, 2020, the district court entered final judgment against Cao concluding that she failed to provide evidence to support her claims and/or her claims were time-barred (App.39-78). The district court did not give notice that it arrived at its conclusions by *sua sponte* considering that Respondents cured their breach, Cao failed to make sufficient consideration and breached-first in January 2011. It did not give notice that it negated Cao's evidence showing that Respondents breached within time limitations, by considering such affirmative defenses and compulsory counterclaim. It made no determinations on whether these defenses, compulsory counterclaim and the evidence it used to support such were waived by Respondents. In fact, Respondents never claimed that Cao breached-first or failed to make consideration in Jan. 2011, not in court nor the real property records. Additionally, Respondents sought to strike the evidence it used to support such defenses and counterclaim for irrelevance, hearsay and unauthenticated business records.

Cao moved for reconsideration asking whether it considered any defenses *sua sponte* and argued that if it did so, such defenses would be waived (App.13-32). Respondents made no objections as to the fact that they waived such factual defenses. The district court denied reconsideration and responded that it "simply

looked at the evidence" to determine that there was no evidence that Cao's claims were within time limitations. (App.33- 38) This implies that the district court did not *sua sponte* consider any defenses. From this point, Cao ceased to challenge its authority to *sua sponte* consider such defenses and counterclaim and did not advance any claim pertaining to such when she appealed to the Fifth Circuit.¹ After the Fifth Circuit's judgment and after Cao discovered on Westlaw, that the district court in fact considered and entered judgment upon the waived defenses and counterclaim, Cao raised the jurisdictional challenge.²

On October 3, 2022, Cao filed a Fed. R. Civ. P. 60 (b)(4) Motion for Relief from Judgment claiming that the district court's final judgment was jurisdictionally defective and constitutionally invalid. The district court denied the motion (App.6-8). Cao sought reconsideration and requested for findings; the district court denied both (App.5). There were no findings as to the courts' jurisdiction to consider and enter judgment upon the defenses and counterclaim. Nor were there any findings as to how any basis can be provided when there was no determination on the matter of waiver and when it implicitly denied that it considered such matters.

Cao appealed and the Fifth Circuit dismissed it on the basis of res judicata, a defense Respondents raised for the first time, on appeal, against Cao's jurisdictional challenge (App.1-4).

¹ She only questioned the Magistrate Judge's consideration to a laches defense against her tolling arguments and the district court's refusal to consider her response to such. The Fifth Circuit's finding that there were no procedural errors pertained only to the abovementioned and the court's recharacterization of the fees for clear error.

² Prior to filing the Rule 60(b)(4) motion in district court, Cao petitioned this Court for a writ of certiorari, raising the jurisdictional challenge for the first time (pet. denied).

REASONS FOR GRANTING THE PETITION

I. Subject-Matter & The Court's Jurisdiction

A. No Authority Provided Under Federal Rules of Civil Procedure

In this civil case, Fed. R. Civ. P. does not supply the courts with any authority to raise the factual affirmative defenses and compulsory counterclaim *sua sponte*. Under Fed. R. Civ. P. 8(c) and Fed. R. Civ. P. 13 (a)(1), a party *must* state an affirmative defense and compulsory counterclaim otherwise waived.

B. No Authority to Bypass Waiver

This Court has made clear that federal courts do not have the authority to override, bypass or excuse a parties' waiver.³ Accordingly, when it has no power to *sua sponte* consider the defenses and counterclaim and no power to bypass waiver, the waived defenses and counterclaim were beyond the bounds of the courts' judicial power. Here, critical to the courts' jurisdiction to consider and enter judgment upon the defenses and counterclaim is a determination that Respondents did not waive such.

This Court has defined "waiver" as an "intentional relinquishment or abandonment of a known right".⁴ In this case, Respondents were given explicit notice that these defenses and counterclaim were "arguable" and that they needed to raise them on objections to avoid their failure of consideration and first-breach defenses from being disposed. They were further given explicit notice pursuant to Fed. R. Civ. P.72(b), that failure to file objections will result in waiver. When Respondents

³ *Wood v. Milyard*, 566 U.S. 463, 132 S. Ct. 1826, 1832, 182 L. Ed. 2d 733 (2012).

⁴ *Id.*

deliberately chose not to raise the defenses on objections, the district court entered the 2019 judgment. Thereafter, Respondents never claimed that the 2019 judgment was erroneous or sought to undo it. Furthermore, Respondents sought to strike, for irrelevance, hearsay and unauthentic business records, the document the district court relied on to support its defenses and counterclaim. Respondents undisputedly waived their known right to raise the defenses, counterclaim and admit the document as relevant evidence to support such.

On its memorandum and order for final judgment, the district court did not give clear notice of the defenses it was considering or that it was doing so *sua sponte*. It merely stated that it modified findings pertaining to the character of the fees Respondents demanded, for clear error. It then concluded that Cao provided no evidence that Respondents breached or made misrepresentations within limitations. Unable to understand how it arrived at its conclusions with such seemingly inconsequential modifications, Cao moved it for reconsideration asking whether it considered any factual defenses *sua sponte*. She argued, without any objections from Respondents, that if it did so, such defenses were waived. Its response, that it simply looked at the evidence to arrive at its conclusions, implied that it did not.

The district court's implicit denial does not constitute as a basis for its authority to consider and enter judgment upon the waived defenses and counterclaim; its judgment was entered in absence of subject-matter jurisdiction. The modifications it made to the character of the fees under the clear error standard were simply a mean to bypass Respondents' waiver. Then when asked whether it considered any

waived defenses, the district court bypassed its requirement to establish its authority, to find that Respondents did not waive such, when it refused to disclose the matters.

II. Procedural Requirements

In habeas cases where a court is provided authority under the Habeas Rules to *sua sponte* consider affirmative defenses, it is required to: (1) give notice of the defense it was considering; (2) notice that it was doing so *sua sponte* and; (3) determine whether the defense was waived.⁵ The question before this Court is whether, in civil cases, the same procedures should be required in force? Had this procedure been applied, neither Cao nor the courts would have been burden with a collateral attack. Moreover, is it not the court's duty and Cao's constitutional rights to be given notice and an opportunity to defend against the claim in which it adjudges to deprive her of her home?⁶

III. Application of Res Judicata on Jurisdictional & Violation of Due Process Claims

Rule 60(b)(4), authorizes relief from a judgment that was entered in absence of subject-matter jurisdiction or in violation of due process. A collateral attack is allowable when the jurisdictional error was "egregious": "the error must involve a

⁵ *Id.*

⁶ Due process, at minimum, requires that deprivation of property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. U.S.C.A. Const. Amend. 5, 14. *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306(1950).

clear usurpation of judicial power, where the court wrongfully extends its jurisdiction beyond the scope of its authority.”⁷

Res judicata bars claims that were resolved in a prior action or claims that should have advanced in a prior action.⁸ To attach res judicata to judgments that were entered without subject-matter jurisdiction, this Court and other sister circuit courts have considered whether there was an administration of correct rules and fair procedure that allowed the party the opportunity to litigate the question of subject matter jurisdiction in the original proceeding.⁹

First, on direct appeal, Cao presented no claims pertaining to the district court’s jurisdiction or its omission because she had not yet realized that she was led astray. Cao did not question the district court’s authority to bypass Respondents’ waiver nor to *sua sponte* consider that she breached first in Jan. 2011. The Fifth Circuit’s decision on the district court’s standard of review is not a resolution on the question of its jurisdiction to consider or enter judgment on defenses and claims Respondent never made. Their assertion that Cao defaulted is not a resolution on whether such matter was waived or the court’s authority to bypass waiver. The Fifth Circuit’s decision as to the procedures concerning the district court’s clear error review or its denial to toll the statute of limitations is not a resolution to the question on whether

⁷ *United States v. Tittjung*, 235 F.3d 330, 335 (7th Cir. 2000); (citing *O'Rourke Bros., Inc. v. Nesbitt Burns, Inc.*, 201 F.3d 948, 951 (7th Cir. 2000); *In re Edwards*, 962 F.2d 641, 644 (7th Cir. 1992); *Kansas City S. Ry. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 825 (8th Cir. 1980)).

⁸ *Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.*, 140 S. Ct. 1589, 206 L. Ed. 2d 893 (2020).

⁹ *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n. 9 (1982); *In re Bulldog Trucking, Inc.*, 147 F.3d 347, 351–354 (4th Cir. 1998); *U.S. v. Van Cauwenberghe*, 934 F.2d 1048, 1058–1060 (9th Cir. 1991).

its omission constituted as unfair procedure that prevented Cao from litigating the question of its jurisdiction.

Secondly, Cao did not consent or silently acquiesce to the district court's actions; she questioned it. Its omission, leading her to believe that it did not take such actions and considered such matters, was the only reason she did not advance her claim on the direct appeal. Had the district court given notice of the defenses and counterclaim it considered *sua sponte*, rather than implicitly denying it, Cao would have had an opportunity to question its authority to do so. Had it made a determination that Respondents did not waive such defenses, Cao would have been provided an opportunity to question whether the basis for its authority was erroneous. Simply put, had Cao been given notice, she would have pressed her claim on direct review. There was and is absolutely no beneficial value for Cao to delay her claim and assert it later in a collateral attack. When a court refuses to establish its jurisdiction and misleads a litigant to believe that it did not adjudicate matters beyond its authority, does it not constitute as an egregious error or manifest abuse of authority?

Despite this fact, the district court denied Cao's Rule 60(b)(4) motion. It simply concluded that the due process violation claim was resolved on appeal and that there were no jurisdictional defects. It made no findings as to its subject-matter jurisdiction or as to whether the claim that its omission violated due process was actually litigated. Cao requested for it to make findings on whether it had had

authority to *sua sponte* consider the waived defenses and counterclaim and as to whether the claim on its omission was actually litigated; it denied the request.

The Fifth Circuit then dismissed Cao's appeal entirely on the basis of res judicata without determining whether Respondents waived such defense against Cao's jurisdictional claim when they failed to raise it below. The Fifth Circuit did not find whether the court had subject-matter jurisdiction. Their decision failed to consider that Cao did not claim that the district court's omission violated due process on the prior action or found irrelevant the fact that its implicit denial was the proximate cause on why she did not advance the claim on the prior action. To bar Cao's claim on the basis that she failed to raise it on the prior action is to fault Cao for relying on the court's order. However, should a litigant, nonetheless a pro se litigant, be expected to question the integrity of court's order? Should a jurisdictionally defective judgment be given the effects of finality by means of a court's omission?

Further and to the extent that the Fifth Circuit applied issue preclusion to dismiss Cao's jurisdictional challenge, the issue of whether the court properly exercised its discretion under the clear error or de novo standard of review to modify the character of the fees cannot preclude Cao's jurisdiction challenge. Discretion to change findings as to the nature of the fees Respondents demanded does not equate to its authority to adjudge that Cao breached first in January 2011, a claim Respondents never made. Neither the clear error nor de novo standard of review authorizes the courts to bypass waiver to *sua sponte* consider defenses and a counterclaim. In addition, Petitioner has not found any case law to which the

application of issue preclusion barred a jurisdictional challenge not advance in a prior action.

None of the courts have answered the question of whether it has authority to *sua sponte* consider and enter judgment on waived affirmative defenses and a compulsory counterclaim. There has been no answer to the question of whether the district court's omission prevented Cao from challenging its authority on the prior action. The question before this Court is whether the courts are required to consider whether correct application of the rules and fair procedure to allow the litigant an opportunity to litigate the question of jurisdiction when attaching res judicata to a jurisdictional challenge. Are the courts required to find subject-matter jurisdiction and find whether a litigant was provided an opportunity to litigate the question of jurisdiction prior to denying or dismissing an appeal for a Rule 60(b)(4) motion?

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,



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No. _____

In the Supreme Court of the United States

ANGELA CAO

Petitioner,

v.

BSI FINANCIAL SERVICES, INCORPORATED et al.

Respondents.

CERTIFICATE OF COMLIANCE

As required by the Supreme Court Rule 33.1(h), I, Angela Cao, certify that the PETITION OF WRIT OF CERTIORARI in the above entitled case complies with the typeface requirement of the Supreme Court Rule 33.1(b). The petition was prepared in a New Century Schoolbook 12 point for the text and 10 point for the footnotes. The petition contains 2,567 words, excluding the parts exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 28, 2023



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